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No. 92-1956

In The

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL and ALAN CARLISLE,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
To The Third Circuit

BRIEF FOR RESPONDENT ALAN CARLISLE

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QUESTION PRESENTED

1. Did the Court of Appeals err when it applied traditional negligence elements of duty, foreseeability, breach and causation to weigh the merits of respondent's claim.

PARTIES TO THE PROCEEDING

Alan Carlisle is an individual and resident of the Commonwealth of Pennsylvania who, until his disability, was a career employee of Petitioner.

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BRIEF FOR RESPONDENT ALAN CARLISLE

OPINIONS BELOW

In *Carlisle v. Consolidated Rail Corporation*, the opinion of the United States District Court for the Eastern District of Pennsylvania denying Consolidated Rail Corporation's motion for summary judgment (A-106 to A-114) was not officially reported. The district court opinion denying Consolidated Rail Corporation's motion for judgment notwithstanding the verdict or for a new trial (A-115 to A-145) is reported at 790 F.Supp. 521 (E.D.Pa.1992). The opinion of the United States Court of Appeals for the Third Circuit (A-73 to A-90) is reported at 990 F.2d 90 (3d Cir. 1993).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. Sec. 1254(1). The judgment of the Court of Appeals in *Carlisle v. Consolidated Rail Corporation* was entered on March 29, 1993. The petition for a writ of certiorari under Supreme Court Rule 12.2 was filed on June 9, 1993, and the petition for a writ of certiorari was granted on October 12, 1993.

STATUTORY PROVISION INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. Sec. 51, provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

In April of 1974, the Federal Railroad Administration issued "An Analysis of the Job of Railroad Train Dispatcher." It detailed the factors which make this a pressure filled occupation noting that specific sources of dangerous stress were the dependence on memory, inadequate staffing, conflict between management's need for production and safety for the worker and public and the pressure for perfect performance since a mistake could result in substantial tragedy. The dispatcher is responsible for the safety of people and cargo that move on the rail system. He or she must often balance this concern with management's insistence for an on-time delivery. The decision making and evaluation process must occur rapidly, with potential disastrous consequences resulting from a mistake.

The working environment often contributes, rather than ameliorates the inherent difficulties of the job. Poor equipment, excessive noise, inadequate communication facilities, and frequent interruptions compound the dispatcher's stress.

Given the above, it is not surprising that the Analysis, after a review of studies and medical summaries, concluded:

> "As a group, train dispatchers showed an exceptionally high incidence of optical nystagmus, (a jumping of the eyes that reflects fatigue, attributed to frequent scanning of train sheets), deafness (attributed to the then-common use of headphones), diseases involving the heart, blood vessels and kidneys, and a group of symptoms usually associated with neuroses and anxiety states. The average age of death was fifty Years with an exceptionally high rate of deaths due to cardiovascular disease. These conditions were attributed to the stress and strain incident to the rate at which some train dispatchers are called upon to perform their duties . . . Later sets of data (1941 – 1950 and 1951 – 1955) showed a median age of death of about fifty-seven for train dispatchers, as compared to a median age of sixty-five for the general population of white males over age twenty-five . . .
>
> These studies, the complaints heard during our present study, and our observations, all cause us to conclude that the stress associated with the performance of train dispatching duties as they are now carried out is real, severe and potentially damaging to the physical and mental health of the dispatchers."

Mr. Carlisle began as a train dispatcher for Conrail in 1976. By 1981 he had moved into a supervisory position and was responsible for all trains moving in and out of Washington, D.C., Philadelphia and Baltimore and Wilmington. Between 1984 and 1987, the railroad reduced its

work force and increased the responsibilities of its dispatchers. Simultaneously, the data available for making safe decisions with respect to individual trains was reduced by the elimination of tower operators who acted as the eyes and ears of the dispatcher.

In May of 1988, Mr. Carlisle's already extensive job responsibilities shifted and increased. He was additionally assigned train master duties in South Philadelphia while being required, sometimes at the same time, to perform the train dispatching and supervisory responsibilities of his previous position. In addition, due to additional reductions in force, Mr. Carlisle was forced to assume the responsibilities previously covered by those whose jobs were eliminated. He now had to oversee operations in several railroads in Philadelphia and enforce safety rules and act as a troubleshooter. This often involved visits to deserted areas which were isolated and crime ridden. He asked his employer for police protection but was refused, forcing Mr. Carlisle to purchase a gun and carrying it even though he had always been opposed to firearms.

From this period on, Mr. Carlisle was required to work 15 hour days for 6 to 13 consecutive days. In one two-week period he worked in excess of 225 hours. While on the job he was prohibited from taking breaks for rest or even lunch. His supervisor who often exhibited signs of intoxication, verbally abused him while on the job and in front of co-workers and constantly called him at home in the middle of the night screaming at him until the abusive, apparently drunk superior, passed out on the phone. The stress was exponentially multiplied when his Conrail superiors continuously ordered him to ignore

safety violations that endangered passengers, workers and freight solely in order to avoid delays.

In 1987 a "Safety Assessment, Consolidated Rail Corporation," was conducted by The Federal Railroad Administration and dealt directly with the conditions at Mr. Carlisle's work place. The report found:

> "Even more disturbing is that the chief dispatcher and assistant chief dispatcher do not have the electronic capability of monitoring the actions of the dispatchers . . .
>
> The dispatching workload at times was excessive to the point that there was an appearance of having made decisions which were not well thought out . . .
>
> Dispatchers worked rest days 267 times during 1986 . . .
>
> The workload factors on both desks are sufficiently high to warrant immediate corrective action by Conrail. Duties not associated with on-track movements should be removed from dispatching responsibility. There is insufficient staff of extra-board dispatchers to provide relief for vacations, personal emergencies or sickness. The division should take the action necessary to assure adequate dispatching personnel are available . . .
>
> FRA found what appears to be a systematic fault within Conrail: too many middle and upper middle managers value 'production' over 'safety' and fail to translate the organizational safety commitment into an effective safety program."

Despite the above, no changes were made in Respondent's work environment.

As conditions on the job deteriorated, Mr. Carlisle began to suffer severe fatigue, day long headaches, and weight loss from 15 to 20 pounds, as the trial court observed, "a significant amount for the not-so-hefty man the court observed at trial." (Trial court opinion, p. 16). He experienced insomnia, bouts of sleepwalking and blackouts to include a sleepwalking incident on the day of his breakdown when his wife found him in a fetal position with a burning cigarette on the floor of his dining room. He also saw co-workers suffer a variety of medical illnesses ranging from heart attacks to nervous breakdowns. Each of these disabled employees had told Conrail of their condition and attributed them to the work place. Both Respondent and his wife registered repeated complaints and requests for assistance, relief and better equipment to the employer which were ignored.

Mr. Carlisle fell into a major depression. His treating psychiatrist, Dr. Real, and internationally known stress expert, Dr. Rosch, unequivocally drew the link between his working conditions and his mental breakdown. In the opinion of both, Respondent's job had caused severe mental and physical health problems. Petitioner's psychiatrist agreed that Mr. Carlisle's illness was caused in part by his work.

SUMMARY OF THE ARGUMENT

Respondent Alan Carlisle was employed as a train dispatcher in an industry that had an obligation under the FELA to provide him with a safe place to work. Despite two separate Federal Railroad Administration reports warning of the hazardous condition of Petitioner's facilities and the threat posed to the physical and mental health of its workers, Conrail took no remedial action. As a result, Respondent suffered a major psychiatric illness accompanied by severe physical symptomology.

The Court of Appeals appropriately found that in a case where the plaintiff is the direct victim of the defendant's negligent acts, the case should be analyzed using traditional tort principles of duty, foreseeability, breach and causation. In doing so, they recognized that some extraordinary safeguards must be adopted in dealing with emotional distress claims. They therefore instructed the lower court to conduct a threshold review of the factual indicia of genuineness of each case.

This test should be approved since it is consistent with common law principles, comports with the analytical approach of a majority of the states and offers sufficient safeguards to insure the integrity of claims.

ARGUMENT

I. THE FELA ALLOWS COMPENSATION TO A WORKER WHO SUFFERS AN INJURY BECAUSE HIS WORKPLACE WAS MAINTAINED IN AN UNSAFE CONDITION WHICH RESULTED IN FORESEEABLE ADVERSE EFFECTS ON HIS PHYSICAL HEALTH.

A. The FELA is a broad remedial statute designed to promote safe working conditions for railway workers.

The FELA provides that every railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . resulting in whole or in part from the negligence of (the railroad)." 45 U.S.C. Sec. 51. This Court has noted: "We have recognized generally that the FELA is a broad remedial statute, and have adopted a standard of liberal construction in order to accomplish (Congress') objectives." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 562 (1987).

A railroad has a clear duty to provide a safe workplace for its employees. *Nivens v. St. Louis S.W.Ry.*, 425 F.2d 114 (5th Cir. 1970); *Sano v. Pennsylvania R.R. Co.*, 282 F.2d 936 (3rd Cir. 1960). As a corollary to this duty the carrier must provide its worker with sufficient assistance in the task assigned to insure that the workplace remains safe. *Blair v. Baltimore & Ohio R.R.*, 323 U.S. 600 (1945). Where the assistance provided is insufficient the railroad is liable for the resulting injury. *Deere v. Southern Pac. Co.*, 123 F.2d 438 (9th Cir. 1941) cert. den'd 315 U.S. 819 (1942). An employee may recover as long as the employer's

negligence "played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac.R.R.Co.*, 352 U.S. 500, 506 (1957).

Furthermore, the act does not limit recovery to certain types of injury while excluding others, nor does it limit recovery to damages sustained in a single incident or accident in the work place. *Urie v. Thompson*, 337 U.S. 163 (1949) points out:

> "We recognize, of course, that when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting from accidents on interstate railroads. Obviously, these were the major causes of injury and death resulting from railroad operations, but accidental injuries were not the only ones likely to occur. And nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage *any injury* 'resulting in whole or in part from the negligence' of the carrier. If such an act can be found, it must be read into the Act by sheer inference . . .
>
> On its face, *every injury* suffered by an employee while employed by reason of the carrier's negligence was made compensable. The wording was not restrictive as to employees covered, the cause of the injury, except that it must constitute negligence attributable to the carrier; *or the particular kind of injury resulting*. To read into this all inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required or *the particular sorts of harm inflicted* would be contradictory to the wording, the remedial and humanitarian purpose, and the

> constant and established source of liberal construction of the Act followed by this Court."

(337 U.S. at 181-82) (emphasis added)

On the issue of which injuries are compensable under the statute, FELA jurisprudence "gleans guidance from common law developments," *Buell*, supra, 480 U.S. at 568, but remains "a federal question, not varying in accordance with the differing conceptions of negligence applicable under statute and local laws . . . " *Urie*, supra, 337 U.S. at 174.

Moreover, the search for appropriate standards of recovery must be conducted while remembering that "(a) primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Buell*, 480 U.S. at 561. "Congress did not intend to create a static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958).

B. The analysis adopted by the Court of Appeals is in accord with common law principles.

As this Court has noted, "While the traditional rule was that a plaintiff could not recover from mental injuries unconnected with actual or threatened impact, the majority of jurisdictions now appear to have abandoned that rule." *Buell*, supra, 480 U.S. at 569, n.20. "Starting with an early Irish decision, the great majority of courts have now

repudiated the requirement of impact, regarding as sufficient the requirement that mental distress be certified by some physical injury, illness or other objective physical manifestation." Prosser and Keaton on *The Law of Torts*, Sec. 54 at 364 (5th Ed.1984).

Professor Keaton points to *Payton v. Abbott Labs*, 368 Mass. 540, 437 N.E.2d 171 (1982) as containing a concise statement of the majority rule:

> We therefore conclude on the basis of the preceding analysis, that in order for any of the plaintiffs to recover for negligently inflicted emotional distress, she must allege and prove that she suffered physical harm as a result of the conduct which caused the emotional distress. We answer further that a plaintiff's physical harm must either cause or be caused by the emotional distress alleged and that the physical harm must be manifested by objective symptomology and substantiated by expert medical testimony. Finally, the emotional stress for which the compensation is sought must be reasonably foreseeable; unless a plaintiff proves that the defendant knew or should have known of special factors affecting that plaintiff's response to the circumstances of the case the plaintiff can recover only for that degree of emotional distress which a reasonable person that normally constituted would have experienced under those circumstances. Whether the emotional distress which a plaintiff has alleged to have experienced is reasonable is to be determined by the finder of the fact."
>
> (at 368 Mass pp. 556-557)

The test utilized by the Court of Appeals in the present case appears well within the confines of the above. " . . . Courts of this circuit should engage in an initial review of the factual indicia of the genuineness of a claim, taking into account broadly used common law standards, then should apply the traditional negligence elements of duty, foreseeability, breach, and causation in weighing the merits of that claim." (Opinion of the Court of Appeals, A-73).

Within this context, it is difficult to reconcile Petitioner's assertion that the Court of Appeals indulged in a "radical departure from common law negligence principles." (Petitioner's brief, pp. 19-20). The heart of their argument is that common law recovery for emotional distress has been limited in most jurisdictions to plaintiffs who suffer a direct physical impact, are placed in a zone of danger of an impact, or are a bystander who witnesses injury to a third party. (Petitioner's brief, pp. 19-20). They then theorize that since Mr. Carlisle's injury did not involve any of the preceding, compensation for his disability would be barred.

The problem with this analysis is that it follows only one line of precedent with a relatively standard fact pattern, a single accident or incident occurs and the plaintiff falls somewhere within the spectrum of direct victim of the negligent act to casual observer of it. What is particularly disturbing is the argument that the "bystander" cases set the common law outer limit for recovery for emotional distress and that "bystander" principles should be applied to the analysis of Respondent's claim.

The question thus becomes whether "bystander" precedent should be applied to a case where the plaintiff is a direct victim of defendant's negligence rather than a witness to it or whether another test is more appropriate. The choice of the analytical framework is crucial to evaluate the common law and precedental foundations of the Court of Appeals' decision.

Rather than force this case into a "bystander" framework, in which it does not belong, it is more appropriate to consider Restatement (Second) of Torts Sec. 436(1):

> If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.

Of particular interest in the present case is the illustration provided by the Restatement (Second) for subsection (1):

> A, employed by B Company, works close to a boiler. On past occasions, the pressure gauge of the boiler has broken, with a loud report and a violent escape of steam. The manager of B Company knows this, and should realize that a repetition of the occurrence is likely to cause shock or fright to any one near the boiler, so extreme as to result in bodily harm. He nevertheless fails to take any precautions. The pressure gauge breaks again, and A is severely shocked and frightened, and as a result suffers an illness which confines her to a hospital for a week. B Company is subject to liability for A's illness.

An illuminating example of this distinction is provided by the development of California law. Prior to *Dillon v. Legg*, 68 Cal.2d 728, 441 P.2d 912, 69 Cal.Rptr. 72 (Sup.Ct. 1968) (en banc) most jurisdictions denied claims for emotional distress flowing from witnessing injury to another. *Dillon*, supra, established a three part test, based on a foreseeability analysis, that permitted bystander recovery.

This decision was not viewed as inconsistent with, or overruling *McMillan v. Western Pacific Railroad Company*, 54 Cal.2d 841, 9 Cal.Rptr. 361, 357 P.2d 449 (1960) which held that a train dispatcher had stated a cause of action when he alleged that the railroad had negligently subjected him to working conditions "of unusual responsibility, stress and tension in that he was required to operate a system of central traffic control of defendant's railroad, which system involved multitudinous and complex mechanical factors and mental decisions, extreme responsibility, constant but shifting attention and numerous clerical functions which imposed an unusual stress and burden upon plaintiff's physical and nervous systems which caused the plaintiff to suffer a severe mental collapse . . . " (at 357 P.2d 449).

Leaving aside that this case is factually similar to the one at hand, the distinction with *Dillon*, supra, was that in *McMillan*, supra, the plaintiff was the direct victim of the employer's negligence. This distinction was made clear in *Molien v. Kaiser Found. Hosps.*, 27 Cal.3d 916, 616 P.2d 813, 167 Cal.Rptr. 83 (1980) which held that *Dillon*,

supra, applied only when the "plaintiff {seeks} recovery of damages . . . suffered as a percipient witness to the injury of a third person." 27 Cal.3d at 923, 616 P.2d at 816, 167 Cal.Rptr. at 839.

The danger of this type of mis-analysis was explored by the *Molien*, supra, court. "By insisting that the present facts fail to satisfy the first and second of the *Dillon* criteria, defendants urge a rote application of the guidelines to a case factually dissimilar to the bystander scenario . . . Hence the significance of *Dillon* for the present action lies not in its delineation of guidelines fashioned for resolution of the precise issue then before us; rather, we apply its general principle of foreseeability to the facts at hand, much as we have done in other cases presenting complex questions of tort liability." 27 Cal.3d at 923, 616 P.2d at 816, 167 Cal.Rptr. at 834-835; (citations omitted).

As precedent developed, California courts took the view that direct victim and bystander cases were governed by two distinct theories of recovery. This framework proved cumbersome and was clarified in *Burgess v. Superior Court (GUPTA)*, 2 Cal. 4th 1064, 831 P.2d 1197, 9 Cal.Rptr. 2d 615 (1992). "The law of negligent infliction of emotional distress in California is typically analyzed, as it was in this case, by reference to two 'theories' of recovery: The 'bystander' theory and the 'direct victim' theory." (at 831 P.2d 1199).

"The distinction between the 'bystander' theory and the 'direct victim' cases is found in the source of the duty owed by the defendant to the plaintiff." (at 831 P.2d 1200). Bystander cases "all arise in the context of physical

injury or emotional distress caused by the negligent conduct of a defendant with whom the plaintiff had no preexisting relationship, and to whom the defendant had not previously assumed a duty of care beyond that owed to the public in general." (at 831 P.2d 1200)

"In contrast, the label 'direct victim' arose to distinguish cases in which damages for serious emotional distress are sought as a result of a breach of duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, one that arises out of a relationship between the two." (at 831 P.2d 1201)

"We have repeatedly recognized that the negligent causing of emotional distress is not an independent tort, but the tort of negligence. The traditional elements of duty, breach of duty, causation, and damages apply." (at 831 P.2d 1200).

Therefore, when Petitioner lists *Dillon*, supra, in their Appendix as a "bystander" case they are quite correct. The difficulty is that this characterization is irrelevant to the question of what California law or the common law is with respect to a plaintiff emotionally injured as a direct result of the negligence of his employer who owed him a preexisting duty to provide a safe place to work. For that You turn to *McMillan*, supra, a case under which Respondent clearly would recover.

Another example is provided by *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990). Petitioner places this case in the bystander classification but fails to note the lengthy analysis of over one hundred years of North Carolina precedent which led the Court to conclude:

"Our cases have established that to state a claim for negligent infliction of emotional distress, a plaintiff must allege that {1} the defendant negligently engaged in conduct, {2} it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as mental anguish) and {3} the conduct did in fact cause the plaintiff severe emotional distress. *See, e.g., Bailey v. Young*, 172 N.C. 661, 90 S.E. (1916); *Green v. Telegraph Co.*, 136 N.C. 489, 49 S.E. 165 (1904); *Young v. Telegraph Co.*, 107 N.C. 370, 11 S.E. 1044 (1890). Although an allegation of ordinary negligence will suffice, a plaintiff must allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice. *E.G., Hancock v. Telegraph Co.*, 137 N.C. 497, 500-501, 49 S.E. 952, 953 (1905). In this context, the term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."

(395 S.E.2d at 97)

North Carolina indeed does have a "bystander" rule, but they also have a test that deals with plaintiffs who are emotionally injured directly by the negligence of the defendant. That test embodies the traditional notions of duty, foreseeability, breach and causation, and is consistent with that approved by the Court of Appeals in the present case.

Petitioner also cannot draw support from precedent placed in their "zone of danger" category, again because of the factual dissimilarities to the case at hand. For example, they place *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) in this classification. The New York courts themselves have recognized that it has no value when analyzing cases where the plaintiff is the direct victim of the negligence and where a preexisting duty of care was present. In *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (Ct.App.1975) the Court noted:

"In the *Tobin* case, the court held that no cause of action lies for unintended harm sustained by one, solely as a result of injuries inflicted directly upon another, regardless of the relationship and whether the one was an eyewitness to the incident which resulted in the direct injuries (p. 611, 301 N.Y.S.2d pp. 554-555, 249 N.E.2d pp. 419-420). In this case, however, the injury was inflicted by the hospital directly on claimant by its negligent sending of a false message announcing her mother's death. Claimant was not indirectly harmed by injury caused to another; she was not a mere eyewitness of or bystander to injury caused to another. Instead, she was the one to whom a duty was directly owed by the hospital, and the one who was directly injured by the hospital's breach of that duty. Thus, the rationale underlying the *Tobin* case, namely, the dangers of extending recovery for harm to others than those directly involved, is inapplicable to the instant case."

(334 N.E.2d at 593)

A second step in evaluating whether the court of appeals took a "radical" approach or utilized mainstream analytical tools to decide this case is to recognize the distinction between negligent acts that result in insubstantial and emotional injury and those where the psychological trauma is severe. This distinction is critical since many courts utilize this test to insure the validity of claims and to prevent trivial or insignificant complaints. It is also a device which acts as a check on the flood of litigation feared by Petitioner.[1]

In the instant case, the Court of Appeals appreciated the difference and noted:

> "The injury here to Carlisle was emotional, accompanied by obvious manifestations. We do not face and we do not decide the issue of whether purely emotional injury, caused by extended exposure to stressful, dangerous working conditions would be compensable under the F.E.L.A." (A-73, n.11)

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[1] Petitioner and various Amici Curiae argue that emotional injuries, often based on psychiatric testimony, are difficult to evaluate and may lead to spurious claims. The difficulty with this proposition is that juries routinely decide issues of pain, suffering and emotional distress in the physical impact, zone of danger and bystander cases as well as many other tort cases. The argument really is one against a category of damages long recognized at common law, rather than an argument peculiar to the tort of negligent infliction of emotional distress.

Moreover, the Court of Appeals test adopted in this case explicitly directs the judge to engage in an initial review of the factual indicia of the genuineness of a claim. Nothing in this analytical approach deprives the trial court of the tools to safeguard against specious litigation.

Therefore, when Petitioner relies on Restatement (Second) of Torts Sec. 436A comment (b) (1965) for the proposition that imposing liability for emotional distress may open the floodgates to fraudulent or inconsequential claims, they neglect the cure provided in the subsequent comment to the same section:

> "The Rule stated in this Section applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage and humiliation. The fact that these are accompanied by transitory, nonrecurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character. This becomes a medical or psychiatric problem, rather than one of law.
>
> (Sec. 436A comment (c)).

The development of the law in this area is capsulized in *Payton v. Abbot Labs*, supra:

> "The Restatement (Second) of Torts Sec. 436A (1965) sets forth what is still the rule adhered to by the majority of American courts: 'If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another and it

> results in such emotional damage alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.' The cases generally hold that physical harm is required but (in accordance with the Restatement (Second) of Torts Sec. 436(2) (1965)) the harm need not be caused by impact or trauma; *physical harm resulting from emotional stress is sufficient.*"
>
> (at 368 Mass. 552) (emphasis added)

While many jurisdictions have not felt the need for a "physical manifestation" test, virtually all that do not, require that the emotional injury be severe. See *Johnson v. Ruark Obstetrics*, supra ("mere temporary fright, disappointment or regret will not suffice," 395 S.E.2d at 97); *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970) ("serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." 472 P.2d at 520). *Burgess v. Superior Court (GUPTA)*, supra ("Moreover, even if Burgess had failed to allege physical injuries, physical injury is not a prerequisite for recovering damages for serious emotional distress especially when, as here, there exists guarantee in the circumstances of the case." at 831 P.2d 1205.)[2]

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[2] The failure to appreciate this jurisprudence also leads to Petitioner's misleading assertion that Respondent would not recover under the workmen's compensation statutes of most states. This simply is not true. See, 1B Arthur Larson, *The Law or Workmen's Compensation* Sec. 42.23 (1987). There is ample precedent to grant workmen's compensation absent an accident involving physical injury but with serious emotional or psychiatric repercussions. See, *Goyden v. State Judiciary*, 256 N.J. Super 438, 607 A.2d 651 (App.Div. 1991), aff'd. 128 N.J. 54, 607 A.2d 622 (1992) ("for a worker's mental condition to be compensable the working conditions must be stressful, viewed objectively, and the believable evidence must support a finding that the worker reacted to them as stressful. In addition, for a present day claimant to succeed, the objectively stressful working conditions must be 'peculiar' to the particular workplace and there must be objective evidence supporing a medical opinion of resulting psychiatric disability in addition to the bare statement of the patient."); *Hammerle v. Workmen's Compensation Appeal Board (Department of Agriculture, Bureau of Dog Law Enforcement)*, 88 Pa. Cmwlth. 486, 490 A.2d 494 (1985) (a work-related mental illness which does not follow a physical injury can be a compensable injury); *Levine v. Workmen's Compensation Appeals Board*, 70 Cal.3d 66, 137 Cal.Rptr. 129 (1977) (compensation awarded where wife develops depressive neurosis and anxiety from husband's dismissal by their mutual employer); *Wolfe v. Sibley, Lindsay and Curr Co.*, 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603 (1975) (claimant who suffered severe depression requiring hospitalization due to suicide of her immediate supervisor had a valid workmen's compensation claim); *Ferguson v. HDE Inc.*, 270 So.2d 867 (La. 1973) (A valid workmen's compensation case stated when claimant suffered a stroke while arguing about his paycheck); *Klimas v. Trans Caribbean Airways, Inc.*, 10 N.Y.2d 209, 219 N.Y.S. 2d 14, 176 N.E.2d 714 (1961) (compensation awarded when executive suffers a heart attack due to delays and mounting costs in a project for which he was responsible); *In the Matter of Gray Trust, ECAB*, Doc. No. 61-131, May 11, 1961 (compensable injury where an embassy employee collapses as a result of sustained fear of mob violence); Larson, supra, Sec. 42.23(b) (" . . . that the stimulus is gradual, in the form of sustained stress, tension, worry, strain, frustration, or harassment, does not . . . make nervous injury any less compensable that if it were caused by sudden shock.")

In this context the Court of Appeals' holding that the "genuineness" of the emotional injury should be evidenced by "factual indicia" within the definition of "broadly used common law standards" is clearly within

the mainstream of precedent. Moreover, the application of traditional tort principles of duty, foreseeability, breach and causation represent the analytical approach most appropriate to the facts of this case.

An application of these principles to Respondent's situation, as the jury was instructed to do, leads to the conclusion that Mr. Carlisle adequately proved his case. Petitioner had a long established and preexisting duty to provide Mr. Carlisle with a "safe place to work." *Nivens v. St. Louis S.W.Ry.* That duty included providing sufficient mechanical and human assistance to insure that his task could be performed without injury. *Blair v. Baltimore & Ohio R.R.; Yawn v. Southern Ry. Co.*, 591 F.2d 312 (5th Cir. 1979).

The fact that the workplace was unsafe and posed a foreseeable risk of serious injury to its workers, was brought directly home to Petitioner by two Federal Railway Administration reports which documented the stressful nature of a train dispatcher's job, the outdated equipment and hazardous working conditions at Respondent's office, and the adverse effect of the situation on the physical and mental health of the employees. Petitioner was also aware that serious problems, including cardiac arrest and nervous breakdowns, had occurred among Mr. Carlisle's fellow workers. Respondent himself passed on other employees' complaints about conditions and expressed his own concerns about job related stress and inadequate support.

Nonetheless, Conrail breached its duty to Respondent by taking no action to ameliorate the hazardous condition or to make the workplace safe. The causal

connection between this breach and the resultant physical, symptomology and emotional illness was amply supported by expert medical and psychiatric testimony to include Petitioner's own psychiatric expert and consistent with the effects predicted by The Federal Railway Administration reports.

In the end, the question for this Court is a simple one: should cases similar to that of Respondents go to the jury for decision? The oft quoted Dean Prosser provides some advice in *Palsgraf Revisited*, 52 Mich.L. Rev. 1 (1953) when he commends the reader to *Jackson v. B. Lowenstein and Bros.*, 175 Tenn. 535 at 538, 136 S.W.2d 495 (1940):

> "{The Palsgraf Case}, by virtue of the sharp difference of opinion of the judges, should be a warning to appellate courts not lightly to assume the primary duty of the determining liability or non-liability, in actions of tort, but leave that duty where the constitution has placed it, with the jury, as triers of facts, and if they act capriciously and arbitrarily to supervise their action."

This point has special significance under the congressionally enacted, to be liberally construed, FELA. Under the FELA, the question is " . . . simply whether the proofs justify with reason the conclusion that {railroad} employer negligence played any part, even the slightest, in producing injury . . . for which damages are sought." *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 506 (1957). Moreover, the Third Circuit, commenting on the *Rogers* standard, stated in *Albergo v. Reading Company*, 373 F.2d 83, 85 (3rd Cir. 1966) cert. den'd 386 U.S. 983 (1967) "the evidence may be minimal but it must be sufficient to

provide the jury with some rational basis for concluding that some negligence of the railroad proximately contributed to the {injury}."

C. Recovery for severe emotional injury is not barred by the Railway Labor Act.

Petitioner raises an issue not briefed or argued to the Court of Appeals, nor included in their Writ of Certiorari. They suggest that recovery for emotional injuries is barred under the FELA since the claim may fall within the arbitration provisions of the Railway Labor Act (RLA) 44 State. 577, as amended, 45 U.S.C. Sec. 151 et seq.

This argument was raised and explicitly rejected by this Court in *Buell*, supra which held that emotional injury claims by railway workers fall within the FELA, but reserved decision on the parameters of such claims.

CONCLUSION

For the foregoing reasons, Respondent Alan Carlisle respectfully requests that, as to *Consolidated Rail Corporation v. Carlisle*, this Court affirm the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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